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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 517

JAMES F. LUMAN,

Petitioner,

Vs.

HANS G. TANZLER, JR., ET AL., as and constituting the members of the Police Disciplinary Hearing Board of the City of Jacksonville, a municipal corporation,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MISCELLANEOUS:

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HANS G. TANZLER, JR., et al., respondents, oppose the issuance of a Writ of Certiorari to the judgment of the United States Court of Appeals for the Fifth Circuit, as prayed for in the petition, and submit herewith their brief in opposition.

QUESTION PRESENTED

Respondents do not agree that the record in this case will support the question presented for review as given by petitioner, but believe the record more accurately supports the following question:

> Whether a police officer removed from the force for violation of police regulations, and for the commission of acts which constitute felonies, who appeals his removal to a police review board requesting a public hearing, resulting in the chief of police filing written charges in support of the removal, is denied any fourteenth amendment right by the refusal of the review board to continue the hearing until disposition of criminal charges against the officer, based on the same acts which formed the basis for his removal from the police force, where such charges were brought after his removal, request for hearing and filing of administrative charges.

CONSTITUTIONAL PROVISIONS. STATE STATUTES AND MUNICIPAL REGULATIONS INVOLVED

Respondents do not agree that any federally protected right is involved herein.

The laws of Florida applicable to the Jacksonville Police Department provide in part:

> "The chief of police shall be the chief executive officer of the police department and have the following powers and duties:
>
> . . .
>
> "(k) To suspend without pay and file written

charges with the police review board against any member of the police force who has served more than one year for the removal of the party so charged as a member of the police force."

Chap. 65-1747, §4, Laws of Florida

"No member of the police force, except the chief of police, who has served more than one year shall be removed from the police force without cause. Within ten days after receiving written notice from the chief of police of such removal, any member of the police force so removed, who has served more than one year, may request a public administrative hearing before a police review board hereby established to be known as the 'police disciplinary hearing board', composed of the members of the city commission, the president of the city council and the municipal judge, with the mayor-commissioner or, in his absence, the municipal judge presiding. If no such request is received in writing by the secretary of the city commission, who shall be the recorder for said board, within the time allowed herein, such right of hearing shall be deemed waived and the removal shall be final. Upon receipt of notice of such request for hearing the chief of police, with reasonable dispatch, shall prefer written charges with the police disciplinary hearing board stating the reasons for such removal and the secretary of the city commission shall promptly give such person so removed due notice of the charges and of the time and place of the hearing. On the hearing of a person so removed from the police force, the police disciplinary hearing board may sustain such removal, or may reinstate such person as a member of the police force, with or without pay, demotion in

rank, or suspension without pay, as it may deem just and proper."

Chap. 65-1747, §5, Laws of Florida

The Rules and Regulations for the organization and government of the Jacksonville Police Department, which have been adopted by the Chief of Police and approved by resolution of the City Commission of the City of Jacksonville, define "conduct prejudicial to the efficiency, good name and reputation of the department" to include, among other conduct, the following:

"5.39

. . .

"(m) Commission of a criminal act in violation of a State or Federal Statute."

The Rules and Regulations further provide, in Rule 5.49:

"The Chief of Police may suspend any member of the Department without pay against which a criminal information or indictment has been filed until disposition shall be made of such criminal charges, reporting such suspension forthwith to the Police Disciplinary Hearing Board for approval or disapproval. In case the Police Disciplinary Hearing Board shall approve such suspension, the member suspended shall be on enforced leave of absence without pay until disposition is made of the criminal charges against him, and he shall not be entitled to pay for such period of suspension regardless of the outcome of the criminal charges against him. The conviction of said member of such criminal charges shall be cause for his removal as a member of the Department without pay from the time of his suspension."

STATEMENT OF THE CASE

The statement of the case made by petitioner is inaccurate and can best be stated thusly:

On December 8, 1967, the Chief of Police of Jacksonville, Florida, removed petitioner from the Jacksonville police force for conduct prejudicial to the efficiency, good name and reputation of the Jacksonville Police Department (R-43). The law regulating the Jacksonville Police Department, Chapter 65-1747, Laws of Florida, provides that any police officer so removed may request a public administrative hearing before a police review board within ten days after removal. If this is not done, the removal is final. Upon receipt of a request for hearing, the police chief must then prefer written charges before the board stating the reasons for the removal (R-5).

Petitioner requested a hearing and the chief of police on December 29, 1967, filed six written charges of misconduct by petitioner, including four charges of the commission of criminal acts in violation of State statutes (R-8, 15).

Thereafter on February 9, 1968, the chief of police filed four additional written charges of misconduct by petitioner, all of which were charges of the commission of criminal acts in violation of state statutes (R-8, 16).

On March 7, 1968, the State of Florida filed a nine count criminal information against petitioner and others. The transactions that are the subject of eight of the counts in the criminal information are the genesis of the charges made against petitioner by the chief of police (R-18).

Respondents scheduled hearing on the charges was twice continued at the request of petitioner. The motion of peti-

tioner for a third continuance was denied (R-10). Thereupon, petitioner filed his complaint for an injunction (R-3-27) on the ground that Rule 5.39(x) of the Jacksonville Police Department (R-7) would compel him to testify against himself or be subject to removal from the Department (R-13). Respondents' answer incorporated two Rule 12 defenses; failure to state a claim and lack of jurisdiction over the subject matter (R-36).

The District Court entered an order temporarily restraining the hearing (R-29), and thereafter entered the permanent injunction (R-68).

On appeal the Fifth Circuit Court of Appeals reversed and remanded the District Court with directions that the injunction be dissolved (R 76-86). A Petition for rehearing (R 87-103) was denied (R-104).

ARGUMENT

Petitioner seeks to bring himself within the ambit of Supreme Court Rule 19(b), on the premise that the Fifth Circuit Court of Appeals has decided a federal question in a way in conflict with applicable decisions of this Court, to-wit: *Gardner v. Broderick*, 392 U.S. 273 (1968) and *Uniformed Sanitation Men Association, Inc. v Commissioner of Sanitation*, 392 U.S. 280 (1968). His vehicle with which he seeks to accomplish this maneuver is Rule 5.39(x)[1] of the Rules and Regulations of the Jacksonville Police Department,

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[1]This rule is not listed by respondents under the heading herein "Constitutional provisions, state statutes and municipal regulations involved" since they feel, as does the Fifth Circuit Court of Appeals, that the rule has not yet come into play.

providing that conduct prejudicial to the efficiency, good name and reputation of the department shall include, among other conduct, the following:

> "Wilful refusal or failure to appear before any Court, judge, prosecuting officer, board or body authorized to conduct any hearing or inquiry in any investigation for a violation of any of the statutes of this state when requested to do so; or, having appeared, refusal to testify or answer any question concerning his conduct as a police officer or the performance of his duties on the grounds that his testimony or answers would tend to incriminate him; or refusal to waive immunity from prosecution on account of any matter about which he may be asked to testify at any such hearing or inquiry."

This appears clear from the allegations of paragraph 8(b) of the Complaint that:

> " . . . the conduct of such a hearing would, under the circumstances, require plaintiff to hazard a guess as to the validity of Rule 5.38(x) (sic) and to testify or not testify before the Board with respect to his conduct as a police officer in the risk, if he does testify, that such evidence as he gives will be used by the State as evidence against him in the criminal proceeding or will be used by the State as information leading to the development of evidence to be used against him in the criminal proceeding and in the risk, if he does not testify, that his failure will constitute conduct prejudicial to the efficiency, good name and reputation of the Department and will constitute grounds for his removal from the Police Department, irrespective of his innocence of the charges against him."

Rule 5.39(x) has no relevance to this controversy. There are no allegations that petitioner was removed from the force on this ground, and the charges attached as exhibit A to the complaint (R-15), and exhibits A and B (R-43, 46) (A 1-6) of the affidavit of J. Mims Ingram (R-41), reflect that this was not the case. The case of *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), cited by petitioner and the district court, as authority for enjoining the administrative hearing, would actually, if petitioner's contention is correct, prohibit the use at any subsequent criminal trial of any compulsory testimony given at the administrative hearing. The court stated:

> "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic."
>
> 385 U .S. at 500

The basis for the ruling of the lower court was given as follows:

> "If plaintiff were to appear before the Board, any testimony he might given could be used against him in the State criminal case now pending, either as evidence or as a means of obtaining evidence. If plaintiff should fail to appear, or refuse to testify, he could be dismissed pursuant to Rule 5.39(x) of the Jacksonville Police Department. Such a choice is impermissible under the Constitution of the United States. See *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), *Spevack* v. *Klein*, 385 U.S. 511 (1967), *Uniformed Sanitation Men Ass'n., Inc.* v. *Comm'r of Sanitation of City of New York*, 36 U.S.L. Week 4534 (U.S. June 10, 1968),

Gardner v. *Broderick*, 36 U.S.L. Week 4536 (U.S. June 10, 1968)." (R-69).

This conclusion of the court was not supported by the record. Petitioner is not faced with the choice of testifying against himself or losing his job. HE HAS NO JOB TO LOSE. This appears clearly from the law regulating the police department (R-5), the letters of the chief of police preferring charges (R-43, 46), and as succinctly stated by petitioner:

> "Here, no need to separate a defaulting employee from his duties and from the public payroll. James F. Luman was effectively removed *months ago* from the police force, from his duties, from his uniform and from the payroll. He has been removed and the only question which by statute the Police Disciplinary Hearing Board is empowered to decide is *whether he shall be reinstated or his removal sustained.* Until he is reinstated, he remains 'removed'."
>
> "The statutory purpose of the hearing procedure is plainly to benefit the removed policeman. That procedure does not come into operation *at all* unless the removed policeman requests it, as was done in this case." (A-66). (Emphasis plaintiff's).

The choice faced by petitioner, when the criminal charges were filed against him, was whether to withdraw his request for an administrative hearing challenging his removel, or risk having the hearing held prior to the criminal trial. Any risk would be limited to the effect his failure to testify in his own behalf would have on the decision of the members of the hearing board.

The bugaboo of Rule 5.39(x) raised by petitioner just does not exist. It is doubtful that *any* court would permit the

rule to be applied retroactively against a person who was not a member of the department at the time the violation of the rule would supposedly have occurred (R-66). Assuming, without conceding, that it does, however, in order for it to be used as a vehicle to remove petitioner, the following would have to occur:

1. Petitioner's refusal to testify at the disciplinary hearing.
2. The police hearing board refused to uphold his removal from the force.
3. Acquittal of all criminal charges.
4. Reinstatement.
5. Removal for having failed to testify.

The happening of the foregoing sequence of events is too remote and speculative to be seriously considered.

Additionally, and perhaps more compellingly, it is obvious that the general charges of conduct prejudicial to the efficiency, good name and reputation of the Police Department; wilful neglect to perform his duties in the manner required by departmental rules and regulations; rules of duty or rules of procedure; wilful departure from the truth in connection with his official duties; and commission of a criminal act in violation of a state or federal statute, involving the performance of his official duties. Specific charges one through ten, with the exception of charge No. 9, all involve acts committed while investigating crimes in the course of his official duties (R-43-49).

Petitioner says Rule 5.39(x) could result in his removal if he refused to testify before the hearing board. If his present status was that he was merely suspended, or was appearing

before the board for a determination as to whether he should be suspended or fired, and he refused to appear or testify, it could and should. As Justice Fortas stated in *Spevack* v. *Klein*, 385 U.S. 511 (1967),

> ". . . a public employee (may be) asked questions specifically, directly, and narrowly relating to the performance of his official duties as distinguished from his beliefs or other matters that are not within the scope of the specific duties which he undertook faithfully to perform as part of his employment by the State. This court has never held, for example, that a policeman may not be discharged for refusal in disciplinary proceedings to testify as to his conduct as a police officer."
>
> 385 U. S. at 519

To the same effect is his language in *Gardner* v. *Broderick*, 392 U.S. 372 (1968),

> "If appellant, a policeman, had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, Garrity v. New Jersey, supra, the privilege against self-incrimination would not have been a bar to his dismissal."
>
> 392 U.S. at 278

In *Garrity* v. *New Jersey*, 385 U.S. 493 (1967), the question presented to the court was whether the state could use the threat of discharge to secure incriminatory evidence against the officer, as it is unconstitutional to impose the choice of self-incrimination or job forfeiture.

The New Jersey statute involved is quite similar to Rule 5.39(x).

Petitioner has made no showing that he is required to waive any constitutional right in connection with either his request for a hearing, or in any appearance before the board.

What petitioner is really saying, is that there is a constitutional right to the continuance of an administrative hearing, or civil trial, until the disposition of any criminal charges based on the same acts. Assume an intoxicated driver of an automobile who fatally injuries a pedestrian. A civil suit and manslaughter charges follow in due course. Does the driver of the auto have a constitutional right to the continuance of the civil trial until disposition of the manslaughter charge? There appear to be no cases saying yes. An annotation at 123 ALR 1453, entitled "Pendency of criminal prosecution as ground for continuance or postponement of civil action involving facts or transactions upon which prosecution is predicated", states the general rule in the negative, as follows:

> "It is generally held that the courts are not compelled to continue or postpone a civil action because of the pendency of a criminal prosecution involving the same facts upon which the prosecution is predicated. The matter is usually addressed to the discretion of the court, and its rulings will not be disturbed unless manifestly erroneous."

This rule is obviously based upon sound principles.

Here, petitioner may never be brought to trial. After all, the nine count information was filed against him on March 8, 1968, and he has not yet been tried. While he is awaiting trial, and with no disposition of the administrative charges, his position remains unfilled.

CONCLUSION

The Petition for Certiorari should not be granted.

Respectfully submitted,

WILLIAM LEE ALLEN
Counsel of Record

CLAUDE L. MULLIS, SR.
Counsel for Respondents

1300 City Hall
Jacksonville, Florida 32202

EXHIBIT "A".

City of Jacksonville
Department of Police
711 Liberty Street
P. O. Box 2070
Jacksonville, Florida 32203

December 29, 1967

Honorable Hans G. Tanzler, Jr.,
Mayor-Commissioner, and Members of
the Police Disciplinary Hearing Board
City Hall
Jacksonville, Florida
Re: Patrolman J. F. Luman, 4355 San Juan Avenue,
Jacksonville, Florida.

Gentlemen:

Pursuant to Chapter 65-1747, Laws of Florida, on December 8, 1967, I gave Patrolman J. F. Luman written notice of his removal from the Jacksonville Police Force, effective December 8, 1967, for conduct prejudicial to the efficiency, good name and reputation of the Jacksonville Police Department.

Under date of December 8, 1967, I received a copy of a letter directed to J. M. Ingram, Secretary City Commission and Ex-Officio Recorder of your Honorable Body, written by attorney R. Hudson Olliff on behalf of Patrolman J. F. Luman, requesting a public hearing before your Honorable Body. Mr. Ingram, as recorder of the Police Disciplinary Hearing Board, gave me written notice that I should, with reasonable dispatch, prefer written charges against Patrolman Luman stating the reasons for such removal.

I now charge Patrolman Luman with conduct prejudicial to the efficiency, good name and reputation of the Police Department; wilful neglect to perform his duties in the manner required by departmental rules and regulations, rules of duty or rules of procedure; wilful departure from the truth in connection with his official duties; and commission of a criminal act in violation of a State or Federal Statute, to-wit:

Charge No. 1.

I charge that on or about May 19, 1967, at National Food of Florida, 2037 Edison Avenue, Jacksonville, Florida, at approximately 4:10 A. M., Officer J. F. Luman, in conjunction with Sergeant J. E. Barnhart, while investigating a breaking and entering thereat, took and converted to his own use therefrom frozen meats.

Charge No. 2.

I charge that on or about May 30, 1967, at or near McCoys Boulevard and Margaret Streets, Jacksonville, Florida, while investigating a safe which had been stolen by parties unknown from Central Tire Company, 341 West Duval Street, Jacksonville, Florida, Officer J. F. Luman, in conjunction with Sergeant J. E. Barnhart, removed therefrom the sum of $187.00 and converted same to his own use.

Charge No. 3.

I charge that on or about November 29, 1967, at Otto's of Vienna, 3611 St. John's Avenue, Jacksonville, Florida, at approximately 2:30 A. M., Officer J. F. Luman, while investigating a reported breaking and entering, in conjunction with Sergeant J. E. Barnhart, broke and entered the owner's locked inner office.

Charge No. 4.

I charge that on or about November 29, 1967, at Otto's of Vienna, 3611 St. John's Avenue, Jacksonville, Florida, at approximately 2:30 A. M., Officer J. F. Luman, while investigating a reported breaking and entering, in conjunction with Sergeant J. E. Barnhart, broke and entered the owner's locked inner office and removed $250.00 from an unlocked safe, and converted same to his own use.

Charge No. 5.

I charge that on or about November 29, 1967, at Otto's of Vienna, 3611 St. John's Avenue, Jacksonville, Florida, at approximately 2:30 A. M., Officer J. F. Luman, while investigating a reported breaking and entering thereat, entered the premises for a period of 4 or 5 minutes, but subsequently reported that he had only entered the premises momentarily.

Charge No. 6.

I charge that on or about November 20, 1967, at the Helmsman Shop, 3551 St. John's Avenue, Jacksonville, Florida, at approximately 1:30 A. M., Patrolman J. F. Luman, while investigating a reported breaking and entering thereat, was the first officer on the scene and entered the building without being directed to do so by the Sector Supervisor.

I request that Patrolman J. F. Luman be given a public administrative hearing before your Honorable Body pursuant to the provisions of Section 5, Chapter 65-1747, Laws of Florida.

Very truly yours,
R. C. BLANTON, JR.,
(R. C. Blanton, Jr.),
Chief of Police.

RCBjr:mn

EXHIBIT "B".

City of Jacksonville
Department of Police
711 Liberty Street
P. O. Box 2070
Jacksonville, Florida 32203

February 9, 1968

Honorable Hans G. Tanzler, Jr.,
Mayor-Commissioner, and Members of
The Police Disciplinary Hearing Board
City Hall
Jacksonville, Florida

Re: Patrolman J. F. Luman, 4355 San Juan Avenue,
Jacksonville, Florida.

Gentlemen:

Pursuant to Chapter 65-1747, Laws of Florida, on December 8, 1967, I gave Patrolman J. F. Luman written notice of his removal from the Jacksonville Police Force, effective December 8, 1967, for conduct prejudicial to the efficiency, good name and reputation of the Jacksonville Police Department.

Under date of December 8, 1967, I received a copy of a letter directed to J. M. Ingram, Secretary City Commission and Ex-Officio Recorder of your Honorable Body, written by attorney R. Hudson Olliff on behalf of Patrolman J. F. Luman, requesting a public hearing before Your Honorable Body. Mr. Ingram, as recorder of the Police Disciplinary Hearing Board, gave me written notice that I should,

with reasonable dispatch, prefer written charges against Patrolman Luman stating the reasons for such removal.

On December 29, 1967, I preferred six charges against Patrolman Luman, and on January 16, 1968, Your Honorable Body set the time for hearing said charges at 9:30 a. m. March 6, 1968.

I now prefer additional charges against Patrolman Luman, charging him with conduct prejudicial to the efficiency, good name and reputation of the Police Department; wilful neglect to perform his duties in the manner required by departmental rules and regulations, rules of duty or rules of procedure; wilful departure from the truth in connection with his official duties; and commission of a criminal act in violation of a State or Federal Statute, to-wit:

Charge No. 7.

I charge that on or about May 30, 1967, at or near Gartners Tool Company, 2000 Edison Avenue, Jacksonville, Florida, at approximately 11:35 p.m., Patrolman J. F. Luman, while assisting in the investigation of a breaking and entering thereat, observed Sergeant J. E. Barnhart converting to his own use tools and equipment therefrom and failed to report same.

Charge No. 8.

I charge that on or about February 26, 1967, at Americana Insurance Groups, 2255 Phyllis Street, Jacksonville, Florida, Paturolman J. F. Luman, while investigating a breaking and entering thereat, broke and entered a locked inner office, removed a cash box from a locked filing cabinet and converted moneys therefrom to his own use.

Charge No. 9.

I charge that during the month of April, 1967, Patrolman J. F. Luman entered an unlocked door at Leeds Shoe Store, Roosevelt Mall, Jacksonville, Florida, and took and converted to his own use several pairs of shoes therefrom.

Charge No. 10.

I charge that on or about November 20, 1967, at the Helmsman Shop, 3551 St. John's Avenue, Jacksonville, Florida, at approximately 1:30 a.m., Patrolman J. F. Luman, while investigating a reported breaking and entering thereat, took and converted moneys therefrom to his own use.

I request that Patrolman J. F. Luman be given a public administrative hearing before Your Honorable Body, pursuant to the provisions of Section 5, Chapter 65-1747, Laws of Florida, at the same time as the charges heretofore preferred.

Very truly yours,
R. C. BLANTON, JR.,
(R. C. Blanton, Jr.),
Chief of Police.

RCBjr:rmp